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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BROOKE JUAREZ, Individually and as
Successor in Interest, etc., et al.,

Plaintiffs and Appellants,

v.

ROGERS HELICOPTERS, INC., et al.,

Defendants and Respondents.

F076225

(Super. Ct. No. 16CECG00116)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Miles, Sears & Eanni, Richard C. Watters, and Megan K. Crosbie for Plaintiffs and Appellants.

Cunnington Swaim, Michael J. Terhar, and Jonathan E. Hembree for Defendants and Respondents, Rogers Helicopters, Inc., and ROAM.

LaMontagne & Amador and Eric A. Amador for Defendant and Respondent, American Airborne, EMS.

On December 10, 2015, flight paramedic Kyle Juarez (Juarez), flight nurse Marco Lopez (Lopez), and pilot Thomas Hampl (Hampl) were transporting a patient via air ambulance in a SkyLife 2000 Bell model 407 helicopter (the helicopter). While en route from the Porterville airport to a Bakersfield hospital, the helicopter crashed into a low hillside outside McFarland, instantly killing all four occupants and destroying the helicopter.

Juarez's heirs, his wife, Brooke Juarez, and their two children, Macey L. and Brody B. Juarez (collectively, appellants), filed a wrongful death lawsuit against the California general partnership that operated the air ambulance business, ROAM, which does business as SkyLife (SkyLife), and its general partners, Rogers Helicopters, Inc. (Rogers Helicopters) and American Airborne, EMS (American Airborne) (collectively, respondents). Respondents moved for summary judgment on the ground that workers' compensation was appellants' exclusive remedy because SkyLife and its general partners were Juarez's special employer as a matter of law. The trial court agreed and granted the motion.

On appeal, appellants contend the trial court (1) applied the incorrect law when it held Juarez was an employee of SkyLife and therefore an employee of the general partners, and (2) improperly weighed the evidence relevant to Juarez's employee status. Finding no merit to appellants' arguments, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Rogers Helicopters, an aviation company founded in 1962, has helicopter and fixed wing operations. It provides air ambulance, firefighting, construction, agriculture and executive charter services. American Airborne is a wholly owned subsidiary of K.W.P.H. Enterprises, Inc., doing business as American Ambulance (American Ambulance). American Ambulance was founded in 1975 to provide emergency and nonemergency ambulance services and medical supply deliveries in Fresno. It has a state-of-the-art emergency medical services dispatch communications center, as well as

administrative, billing and operations departments, which are located in the Fresno area. American Ambulance serves as the sole emergency medical service provider of the Fresno County and Kings County ambulance operating areas, and provides ambulance dispatch services for ambulance providers in Fresno, Kings and Madera Counties.

The SkyLife Partnership

In 1991, Rogers Helicopters and American Airborne formed a general partnership and for-profit business called ROAM (an amalgamation of Rogers and American), and registered a fictitious business name for the partnership—SkyLife. A revised partnership agreement was entered into in 2012 (the partnership agreement), which stated the business would be conducted under the firm name and style of “ROAM, a California partnership, dba SkyLife,” and the partnership’s purpose was to provide air ambulance services throughout California. According to the partnership agreement, Rogers Helicopters and American Airborne share equally in the profits and losses of the SkyLife business. According to Todd Valeri (Valeri), who is American Ambulance’s president, chief executive officer and sole shareholder, as well as American Airborne’s president, American Airborne entered into the partnership on American Ambulance’s behalf.

Although American Ambulance is not named in the partnership agreement, it acted as a general partner, according to Valeri and Rogers Helicopters’ vice president, Robin Rogers (Rogers). Under the partnership agreement, American Airborne was primarily responsible for billing and accounting services, and was required to provide medical personnel and services, while Rogers Helicopters was required to provide aircraft personnel, aircraft maintenance, and aircraft operating procedures. It was American Ambulance, however, that provided the medical equipment and personnel, who are nurses and paramedics employed by American Ambulance, while Rogers Helicopters provided the aircraft operations, including pilots and mechanics employed by Rogers Helicopters. American Ambulance and Rogers Helicopters kept their employees on their own payrolls and workers’ compensation policies, and billed SkyLife on a monthly basis

for their respective payroll, benefits, and insurance, including workers' compensation insurance, attributable to their employees assigned to work for SkyLife.¹ SkyLife checks were cosigned by Valeri and Rogers on behalf of American Ambulance and Rogers Helicopters, respectively.

American Airborne and Rogers Helicopters held joint title to the SkyLife aircraft, including the helicopter involved in the accident.² Beyond American Airborne's joint ownership of the aircraft and status as SkyLife's general partner, American Airborne had no accounting records, payroll, insurance, personnel, facilities, physical locations, equipment management, employees, board of directors, or other business activities separate from American Ambulance. Valeri testified in his deposition that he did not know the difference between American Ambulance and American Airborne, and could not articulate a distinction between the two entities. Valeri was not familiar with American Airborne's corporate bylaws; did not know whether American Airborne held shareholder meetings; could not identify the board of directors; and knew of no American Airborne meeting minutes other than a single instance in 2014.

Both Valeri and Rogers considered the SkyLife partnership to be between American Ambulance and Rogers Helicopters, which was how the partnership was held out to the general public and their employees. As stated on the SkyLife website:

¹ In May 2003, ROAM, Rogers Helicopters and American Airborne entered into a "Mutual Indemnification Agreement," in which Rogers Helicopters and American Airborne agreed to hold each other and ROAM harmless for personal injury claims made against either partner by the other partners' officers, directors or employees as a result of the other partners' performance of their obligations. The indemnification obligation, however, would not apply to the extent any personal injury claim was covered by an insurance policy, such as workers' compensation.

² American Airborne and Rogers Helicopters owned the helicopter on SkyLife's behalf. SkyLife leased the helicopter to Rogers Helicopters, as Rogers Helicopters held the required commercial aircraft operating certificate under Part 135 of the Federal Aviation Regulations.

“SkyLife is a partnership between American Ambulance and Rogers Helicopters, established in 1991. Aircraft are owned by the partners and operated by Rogers Helicopters, Part 135.”

SkyLife program director, Lisa Epps (Epps), who runs SkyLife’s day-to-day operations on the partnership’s behalf (and is on American Ambulance’s payroll), and SkyLife medical crew supervisor, Vince Ellis (Ellis) (an American Ambulance employee assigned to SkyLife), supervise many of the medical personnel’s clinical day-to-day activities. Bill Poe (Poe), Rogers Helicopters’ director of operations, is in charge of SkyLife aircraft piloting, along with chief pilot, Steve Weidekamp (Weidekamp), while Rogers Helicopters’ director of maintenance, Jeff Davies, oversees aircraft maintenance.

The SOP Manual

SkyLife details its policies and procedures in its SkyLife standard operation procedures manual (SOP manual). The SOP manual states SkyLife is a “partnership between American Ambulance/American Airborne EMS and Rogers Helicopters, Inc.,” and includes a “SkyLife Organizational Chart” depicting the organizational structure.³ The SOP manual explains that the SkyLife air ambulance service is staffed on a 24-hour basis with a flight nurse, flight paramedic and an “EMS pilot.”

The SOP manual is intended to augment existing employee handbooks and operational procedures, and provides that “SkyLife employees are also responsible for their individual company policies and governing regulations.” The term “employees” is used throughout the SOP manual to refer to SkyLife personnel. The SOP manual

³ The chart depicts SkyLife in the center, with arrows drawn to it from Rogers Helicopters and American Ambulance/American Airborne. From SkyLife, arrows point down to the SkyLife program director, medical crew supervisor, and flight nurses and paramedics. From Rogers Helicopters, arrows point down to the director of operations, maintenance director, chief pilot and aviation manager, and “SkyLife Pilots & Mechanics.” From American Ambulance, arrows point down to “Finance & Dispatch,” which includes a director and communications director, and medical billers and communications specialists.

contains job descriptions for various positions within SkyLife, including administrative assistant/biller, aviation manager, flight paramedic, flight nurse, lead EMS mechanic, lead EMS pilot, medical director, medical crew supervisor, EMS pilot, program director, and program manager. The “Flight Paramedic” job description identifies the “Department” as “SkyLife” and states the flight paramedic reports to the “SkyLife Program Director.”

Epps was responsible for providing a copy of the SOP manual to all aviation and medical personnel as part of their initial SkyLife training. Epps required all personnel to review the SOP manual and familiarize themselves with it. The SOP manual was referenced frequently in staff and safety meetings attended by crewmembers.

The SOP manual contains detailed policies concerning professionalism, safety, and operations. The policies under professionalism include: (1) requiring employees to maintain a professional image by limiting the jewelry, perfume or cologne, hairstyle and color, and nail length employees may wear, and requiring flight crewmembers to wear uniforms with the SkyLife logo; (2) requiring SkyLife personnel to have current and active licenses and certifications, and imposing a disciplinary suspension for failing to timely submit a renewal to human resources; (3) listing the procedures and duties the flight crew is required to perform when on a SkyLife shift, such as log-in, unit and equipment check-out, documentation of events, prescribed time limits and acceptance of patients; (4) establishing procedures regarding crew quarters, which SkyLife provided within airport grounds, aircraft and airport security; and (5) defining methods of communication and navigation, and requiring crewmembers to adhere to strict communication requirements and restrictions while in flight (such as “sterile cockpit” procedures during takeoff and landing).

The safety policies include: (1) providing that “Rogers Helicopters FAR Part 135 Operations Manual and the FAA regulations” direct all aspects of SkyLife operations, to which the pilot-in-command must ensure strict compliance, delegating authority over

flight safety and medical flight operations to the pilot-in-command (a general employee of Rogers Helicopters who is assigned full-time to SkyLife), and giving the pilot-in-command “the final authority for safety of flight,” as well as “all loading of equipment, or anything related to the operation of the aircraft”; and (2) setting a weight limit for medical crewmembers, and giving SkyLife authority to weigh crewmembers and remove from flight duty those who exceed this limit until compliance is met.

The operations policies include: (1) providing that patient care must meet, at a minimum, “the acceptable level of care as required by medical control, CCEMSA and SkyLife’s Medical Director,” and stating the “[d]etails of patient care are outlined in the SkyLife Clinical Protocols and must be followed”; (2) defining scheduling of pilots and medical crewmembers, placing the “Program Director” and “Chief Pilot” in charge of scheduling, limiting shifts to 24 hours, setting out typical work schedules for flight nurses, flight paramedics and pilots, and stating that “[o]ther work schedule and compensation information is located in the individual company employee handbook” and “[p]ilot scheduling and duty time is addressed in Roger’s Helicopters part 135 Operations Manual”; and (3) requiring annual employee evaluations by the program director or supervisor.

As the program director, Epps enforced SkyLife’s policies and procedures as found in the SOP manual, including the uniform requirement, the rules regarding personal appearance and the weight limit. Epps had the authority to weigh crewmembers in the field and reserved the right to remove a crewmember for violations. If medical personnel fell out of certification for too long without correction, Epps was responsible, along with the human resources department, to remove them from further shifts until the matter was rectified.

Juarez's Employment

American Ambulance hired Juarez as an emergency medical technician in September 2006,⁴ and he became a paramedic in 2008.⁵ In August 2012, Juarez applied to SkyLife to work as a flight paramedic. He submitted a resume which stated his objective was “[t]o gain a position as a paramedic with SkyLife in order to assist patients in critical situations.” Juarez was interviewed by Epps, Ellis, and Robert Adams, American Ambulance’s director of human resources (Adams).

SkyLife does not have a separate human resources department or director. Adams does the hiring for American Ambulance and oversees the process when its employees are interested in working at SkyLife. An interested paramedic must first meet minimum requirements and submit a letter of interest, which is followed by an interview process typically conducted by Adams, Epps, and Ellis. A paramedic who is selected to work at SkyLife is assigned to SkyLife for part of their workweek. All SkyLife paramedics first worked in ground transportation as American Ambulance employees.

Juarez began working as a SkyLife flight paramedic on a full-time basis in September 2012, earning hourly and overtime wages. He typically worked two 24-hour shifts each week, when he would be stationed at a SkyLife facility at either Fresno-Yosemite International Airport or the Visalia airport.⁶ Juarez also continued to work as a

⁴ American Ambulance maintained an “Employee File Report” on Juarez from the beginning of his employment with American Ambulance until the date of his death, which included information concerning his employment, such as his demographics, titles, positions, employee statuses, and salary.

⁵ A paramedic provides emergency and nonemergency medical care to the sick and injured, and typically makes decisions regarding how a call and on-scene operations will run by prioritizing and delegating. Paramedics go through extensive training and an evaluation period before they are allowed to become a “solo paramedic” at American Ambulance.

⁶ During the 24-hour shifts, medical personnel were required to stay on base, sleeping and eating there, and to limit their activities and visitation during “down-time.”

ground ambulance paramedic with American Ambulance. Juarez's schedule was coordinated between SkyLife and American Ambulance. American Ambulance's scheduling coordinator, Casey Jenkins, scheduled for field operations, while Epps scheduled for SkyLife. The flight paramedics bid by seniority at SkyLife to either Ellis, Epps or American Ambulance's operations director. Collaboration between SkyLife and American Ambulance was required because paramedics typically worked one ground ambulance shift and one or two SkyLife shifts.

Juarez's payroll records indicated when he worked a shift for SkyLife as a flight paramedic and when he worked a shift as an American Ambulance ground paramedic. When Juarez performed air ambulance work with SkyLife, he was paid through American Ambulance's payroll system out of American Ambulance's account. Juarez received benefits such as health and life insurance, a retirement plan, and vacation and sick leave, through American Ambulance, as provided in American Ambulance's employee handbook.⁷ The employee handbook also contained employee discipline and grievance procedures that applied to Juarez. Valeri determined Juarez's wages, including raises and bonuses.

According to Epps, Juarez was given a copy of the SOP manual when he was accepted as a flight paramedic. Juarez attended most SkyLife monthly safety meetings and mandatory quarterly staff meetings, which Epps oversaw, along with preflight

The same rules applied to pilots, except they were limited to 12-hour shifts. Both the Fresno and Visalia bases had kitchen, bath, changing and sleeping facilities.

⁷ In the American Ambulance "Agreement and Acknowledgment of Receipt of Employee Handbook," which Juarez signed, it states: "Employer and Employee agree that this Handbook exclusively sets forth American Ambulance's employment policies and procedures and represents and expresses their complete agreement regarding the terms and conditions of employment. Employer and Employee further agree that none of these policies and procedures can be amended, modified or altered in any way by oral statements or in any other way, but can only be altered by written amendment signed by General Manager of American Ambulance."

briefings and postflight debriefings. When working on SkyLife flights, Juarez wore a SkyLife uniform identical to the pilot's uniform, and used SkyLife equipment aboard SkyLife aircraft. The flight crew, including Juarez, would participate in a "go/no-go" decision process before each medical transportation flight, by which any member of the team could veto a flight mission, considering the conditions and circumstances bearing on that flight.

Rogers Helicopters provided training to medical flight crewmembers, including Juarez and Lopez, on flight-related skills for the safe transport and care of emergency medical passengers through its medical personnel training program. This training was commensurate with, and required by, Rogers Helicopters' duties as an aircraft operator holding a certificate under section 135.621 of Part 135 of the Federal Aviation Regulations (FAR).⁸ The training was provided by Rogers Helicopters' pilots, administrators and computerized training systems, and concentrated on the physiological aspects of flight that affect the crew and emergency medical passengers, safety in and around the helicopter, efficient and safe communication with the pilot, airport security, mapping, and the use of night vision goggles. The last time Juarez received medical personnel training from Rogers Helicopters was in May 2015. Since being employed as an American Ambulance paramedic in 2008, Juarez received all of his medical training through American Ambulance at its facility, as Rogers Helicopters does not train medical personnel in how to provide medical care or treatment.

On the day of the accident, Juarez was an employee of American Ambulance who was performing his duties as a SkyLife flight paramedic.⁹ With respect to this flight,

⁸ Part 135 is part of title 14 of the Code of Federal Regulations, which governs common carriage in aviation and includes air ambulance operations, as well as other common carrier functions of Rogers Helicopters, such as air charters.

⁹ At that time, SkyLife operated three helicopters out of the Fresno and Visalia airports and transported about 1,000 patients per year. SkyLife was supported by a team of about 26 medical staff and 12 pilots who worked together in alternating shifts.

consistent with the parties' practice, American Ambulance would have billed SkyLife for the overhead expenses associated with Juarez's work, while Rogers Helicopters would have billed SkyLife for the expenses associated with the flight's pilot-in-command, Hampl.¹⁰

Within a week of the accident, Brooke Juarez spoke with Valeri by phone about the cause of the crash. Valeri told Brooke he did not know the cause and there was a "large separation" between American Ambulance and Rogers Helicopters, which he described as a "wall," such that each company was in charge of its own employees—Rogers Helicopters was in charge of the pilots, mechanics and aircraft, while American Ambulance was in charge of the nurses and paramedics. Valeri asserted there was no overlap or collaboration in job responsibilities, or oversight of, SkyLife crewmembers. For that reason, the two companies did not "share information very much" and he had not communicated with Rogers Helicopters regarding the cause of the crash.

On January 26, 2016, Hampl's widow, Rashel Hampl, received an email from Valeri, in which he asked her if she had heard anything from the "National EMS Memorial." He explained he received a letter from the national memorial stating Juarez and Lopez would be recognized, but because Hampl was not an American Ambulance employee, he had not received notice regarding Hampl.

SkyLife was listed as a named insured on the workers' compensation policy issued to American Ambulance by Alaska National Insurance Company, which covered Juarez. Appellants have collected a workers' compensation death benefits award due to the accident. Rashel Hampl also was being paid workers' compensation death benefits, but from Rogers Helicopters' workers' compensation insurer, American International Group.

¹⁰ Rogers Helicopters hired Hampl in August 2012. Beginning in June 2015, Hampl flew full time on SkyLife air ambulance flights exclusively. Hampl had two seven-day duty weeks per month, when he worked 12 hours on and 12 hours off.

When Juarez worked as part of the flight crew, Epps considered him to “function as an employee of ROAM/SkyLife.” Rogers considered all SkyLife pilots and medical crew, including the pilot and crew involved in the accident, to be employees of SkyLife and its general partners. Epps stated that under her supervision, SkyLife provided the work to be performed. In addition, Epps supervised the details and quality of the tasks that Juarez, as well as the other flight paramedics and nurses, performed. Epps claimed Juarez was under her direct supervision, as well as that of Poe (concerning flight operations) and the SkyLife pilot-in-command, such as Hampl.

According to Rogers, while SkyLife medical flight operations were a team effort, each pilot-in-command was in control of the medical flight. Rogers considered medical flight personnel such as Juarez to be “crewmembers” of Rogers Helicopters, acting in its role as the Part 135 operator of the medical flight, under FAA Part 135’s “operations specifications,” which defines a “medical crewmember” as “[a] person with medical training who is assigned to provide medical care and other crewmember duties related to the aviation operation during flight,” and requires the “flightcrew” to “satisfactorily complete” Rogers Helicopters’ approved training program before commencing hospital air ambulance flights. Rogers Helicopters’ Part 135 Operations Manual, which provides that the “use of this manual is limited to employees of Rogers Helicopters, Inc.,” states that “[e]ach [assigned] crewmember is Rogers Helicopters’ direct employee,” which is consistent with Rogers’s understanding of the status of medical crewmembers as defined by the FAR.

When asked about a statement in Rogers Helicopters’ chief pilot job description that “[t]he chief pilot is directly accountable to the director of operations and directly supervises the flight crew members,” Weidekamp testified the “director of operations” was his boss, Poe, and the “flight crew members” included the pilots. As provided in the Part 135 Operations Manual, it was Weidekamp’s responsibility “to determine that all personnel under his direction have read and are familiar with applicable portions of this

Operations Manual and Operations Specification.” Weidekamp testified those personnel were the pilots, who he confirmed did not supervise the way in which medical care was provided to patients.

While Weidekamp had authority to fire Rogers Helicopters and SkyLife pilots, Epps did not. If she wanted to terminate a pilot, she would speak to Weidekamp and the two would collaborate on how to handle the issue. Epps, who was involved in reviewing the performance of SkyLife personnel, also did not have the independent authority to discipline or terminate flight paramedics—she did that collaboratively through American Ambulance, including its human resources department and Valeri. A paramedic who was terminated from being a flight paramedic could continue working for American Ambulance in its ground operations.

The Complaint and Amendment

On January 14, 2016, appellants filed a complaint for wrongful death against Rogers Helicopters and 50 doe defendants, which included two causes of action—wrongful death/negligence and a survivors cause of action under Code of Civil Procedure section 377.30. The complaint alleged Rogers Helicopters and the doe defendants “negligently owned, leased, possessed, controlled, occupied, maintained, managed and operated the Bell 407 helicopter described herein above as to cause it to crash into terrain, causing the death of plaintiffs’ decedent. Defendants’ conduct was negligent, lacked reasonable due care, and was negligent per se in violation of applicable laws, statutes, codes and regulations.” On May 23, 2016, appellants filed a “First Amendment to Complaint for Wrongful Death” substituting American Airborne in place of doe one and ROAM in place of doe two.

The Summary Judgment Motions

In January 2017, respondents filed two summary judgment motions—American Airborne filed one, and ROAM and Rogers Helicopters filed the other. Respondents included supporting declarations from Epps, Rogers and Valeri with each motion.

American Airborne argued worker's compensation was appellants' exclusive remedy under Labor Code sections 3601 and 3602 for the following reasons: (1) since American Airborne and its parent company, American Ambulance, essentially acted as one, both were immune from tort liability for death of an employee of either of them; and (2) to the extent SkyLife's acts and omissions may be imputed to American Airborne as a SkyLife partner, American Airborne and SkyLife were both Juarez's special employers. American Airborne further argued that since SkyLife was immune as a special employer, American Airborne also was immune as a SkyLife partner, citing *Sonberg v. Bergere* (1963) 220 Cal.App.2d 681, 682 (*Sonberg*), which held that an employee of a partnership injured in the course and scope of employment by a partner's negligence may not maintain an action to recover damages from the negligent partner, but instead was limited to recovery for workers' compensation. SkyLife and Rogers Helicopters also argued they were immune from liability because they both were Juarez's special employers.

Appellants filed a separate opposition to each motion. With respect to each motion, appellants filed written objections to the declarations of Epps, Valeri and Rogers, asserting, among other things, that they lacked foundation.

In their opposition to American Airborne's motion, appellants argued there were triable issues of fact regarding Juarez's employment status, as well as the "parent-subsidary" relationship American Airborne claimed with American Ambulance. Appellants contended American Airborne's liability was independent of American Ambulance's conduct, Juarez was solely American Ambulance's employee, and Juarez was not a special employee of American Airborne. Appellants also argued the motion was premature to the extent it involved issues of American Airborne's liability, as respondents were precluded by federal law from releasing information concerning the accident, and the helicopter could not be inspected, until the National Transportation Safety Board (NTSB) released its report of the accident. Appellants requested that the

motion be continued pursuant to Code of Civil Procedure section 437c, subdivision (h) to permit additional liability discovery following release of the relevant NTSB report.

In their opposition to SkyLife's and Rogers Helicopters' motion, appellants argued triable issues of fact existed regarding Juarez's employment status, as it was undisputed American Ambulance was Juarez's employer, and there were issues of material fact as to whether Juarez was SkyLife's and Rogers Helicopters' special employee.

In reply, American Airborne argued that to defeat the motion, appellants had to show: (1) a substantial, relevant distinction between American Airborne and American Ambulance, and (2) despite its status as a partner in SkyLife, which was Juarez's special employer, American Airborne cannot be deemed to have exercised special control over him. American Airborne asserted appellants failed to make either evidentiary showing and it clearly was immune from tort liability because (1) its role in SkyLife was interchangeable with that of American Ambulance, and (2) it was a partner of Juarez's special employer, SkyLife. American Airborne argued appellants' request to continue the motion to await the results of the NTSB accident investigation was baseless because it was impossible for the investigation to attribute fault to American Airborne based on any theory that would circumvent its immunity.

SkyLife and Rogers Helicopters argued in their reply that regardless of the written partnership agreement, there was a longstanding, functioning, general partnership between American Ambulance and Rogers Helicopters, such that each were general partners in SkyLife. Since Juarez was working on the fatal flight for the SkyLife partnership as a loaned employee of American Ambulance, he also was working for Rogers Helicopters.

In April 2017, the trial court issued a tentative ruling that the declarations of Epps, Valeri and Rogers lacked sufficient foundation, and continued the hearing until the end of July to allow respondents to file revised declarations, which they did in May 2017. Appellants filed a supplemental opposition to the summary judgment motions in early

July in which they argued the revised declarations “fail to address significant issues of fact that remain in dispute.” Appellants renewed their argument that summary judgment was improper because the NTSB had not issued its report.

Respondents filed replies to the supplemental opposition. With respect to the request for continuance, SkyLife and Rogers Helicopters noted the trial court, in its initial ruling, stated the continuance would give appellants time to muster evidence relevant to the liability issues raised in the oppositions, but the hearing was not being continued specifically for that purpose since appellants had not explained “how any such liability issues would defeat the workers’ compensation exclusivity grounds raised in the moving papers.” SkyLife and Rogers Helicopters asserted that appellants still had not explained how liability issues could defeat the workers’ compensation exclusivity doctrine, at least as to them. American Airborne also argued liability discovery was irrelevant to a resolution of the motion.

On July 25, 2017, the trial court issued a tentative ruling granting both summary judgment motions. The trial court first noted the revised declarations, which appellants did not file any written objections to, had resolved the evidentiary issues. The trial court found there was no meaningful distinction between American Airborne and American Ambulance, and the two were, for all intents and purposes, one and the same. The trial court further found the undisputed facts demonstrated American Ambulance was Juarez’s general employer and SkyLife his special employer, which extended to both Rogers Helicopters and American Airborne as partners in SkyLife based on *Sonberg, supra*, 220 Cal.App.2d 681. In addition, American Airborne was immune from liability as the subsidiary of American Ambulance.

After reviewing the factors to be considered in determining whether a special employment relationship existed, the trial court determined there was no triable issue as to whether Juarez was a special employee of American Airborne as a partner of SkyLife. Moreover, because SkyLife’s and Rogers Helicopters’ relationship with Juarez arose

from SkyLife's general partnership business of providing air ambulance services, of which Rogers Helicopters was an essential part, and it was undisputed Juarez was performing SkyLife business at the time of his death, SkyLife and Rogers Helicopters also were his special employer. Therefore, workers' compensation immunity benefited the partners, including Rogers Helicopters.

The trial court denied appellants' request to continue the hearing to await the NTSB accident report, as they failed to explain how any liability evidence would preclude summary judgment on the grounds of workers' compensation exclusivity, which was the sole ground raised in the motions.

At the July 27, 2017 hearing on the motion, appellants' attorney argued for the first time that *Sonberg* was no longer good law because California had since enacted Corporations Code section 16201, which states: "A partnership is an entity distinct from its partners." The attorney argued while Juarez "certainly was employed by one of the partners, American Ambulance," there were questions of fact as to whether he was employed by the partnership. The attorney asserted the instant case was like *Rogness v. English Moss Joint Venturers* (1987) 194 Cal.App.3d 190 (*Rogness*), which was the law that "could be applicable here" and "worthy of the Court's consideration." The attorney also argued there were factual disputes regarding whether Juarez was respondents' special employee. Finally, the attorney argued American Airborne might be liable outside of workers' compensation if it was independently negligent, yet appellants had not had the opportunity to determine whether American Airborne itself did something negligent, although the attorney admitted he did not know what the nature of that negligence might be.

SkyLife's and Rogers Helicopters' attorney argued *Rogness* was distinguishable from this case, where a true partnership existed, and therefore was a red herring. With respect to partnership law, Corporations Code section 16301 still states that each partner is the agent of the partnership for the purpose of its business, and since SkyLife can only

act through its general partners, American Ambulance and Rogers Helicopters, SkyLife in fact had the right to terminate Juarez. Each partner exercised significant areas of control that overlapped each other and was engaged in a collaborative effort, which was the purpose of forming a partnership. American Airborne's attorney added that evidence of control, which was the predominant factor, was overwhelming. After appellants' attorney addressed the trial court's question about whether SkyLife had control over firing, the trial court took the matter under submission.

On August 14, 2017, the trial court issued an order adopting the tentative ruling. The trial court subsequently entered judgment in favor of SkyLife, Rogers Helicopters and American Airborne.

DISCUSSION

I. The Special Employment Doctrine and Standard of Review

Workers' compensation laws are designed to provide injured workers with swift and certain payments for on-the-job injuries, without the need to prove employer negligence, and without such common law defenses as comparative negligence. Part of this trade-off for the workers' compensation remedy is the statutory bar to tort actions against employers. (Lab. Code, § 3602, subd. (a).) In this way, California's workers' compensation system "represents a balance between the advantage to the employer of immunity from liability at law and the advantage to the employee of swift and certain compensation." (*Jones v. Kaiser Industries Corp.* (1987) 43 Cal.3d 552, 562.)

The workers' compensation system recognizes that employees may work for dual employers, with the original or "general" employer hiring out employees to the "special" employer. (*Kowalski v. Shell Oil Co.* (1979) 23 Cal.3d 168, 174 (*Kowalski*); see *Santa Cruz Poultry, Inc. v. Superior Court* (1987) 194 Cal.App.3d 575, 578; *In-Home Supportive Services v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3d 720, 732 (*In-Home Supportive Services*).) In such circumstances, the employee who sustains work-related injuries will be limited to redress through the no-fault workers'

compensation system. The employee accordingly is barred from bringing a civil action against *either* employer. (*Kowalski, supra*, at p. 175.)

The primary indicator of a special employment relationship is whether the special employer has the right to control and direct the detailed activities of the employee or the manner and method in which the work is performed. (*Kowalski, supra*, 23 Cal.3d at p. 175; *Wedeck v. Unocal Corp.* (1997) 59 Cal.App.4th 848, 856–857 (*Wedeck*).) There may be factors secondary to the right to control as well, such as those used to determine whether a person is an employee. (*State ex rel. Dept. of California Highway Patrol v. Superior Court* (2015) 60 Cal.4th 1002, 1013–1014.)¹¹ Appellate courts have considered secondary factors such as whether: (1) the borrowing employer’s control over the employee and his or her work extends beyond mere suggestion of details or cooperation; (2) the employee is performing the special employer’s work; (3) the original and special employer had an agreement, understanding or meeting of the minds; (4) the employee agreed to the new work situation; (5) the original employer terminated its relationship with the employee; (6) the special employer furnished the tools and place for performance; (7) the new employment was over a considerable length of time; (8) the borrowing employer had the right to fire the employee; and (9) the borrowing employer was obligated to pay the employee. (*Caso v. Nimrod Productions, Inc.* (2008))

¹¹ These secondary factors, which our Supreme Court derived from the Restatement Second of Agency, are: “ ‘ “(a) [W]hether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee.” ’ ’ ” (*State ex rel. Dept. of California Highway Patrol v. Superior Court, supra*, 60 Cal.4th at pp. 1013–1014.)

163 Cal.App.4th 881, 889 (*Caso*), citing *Riley v. Southwest Marine, Inc.* (1988) 203 Cal.App.3d 1242, 1250.)

On the other hand, certain circumstances tend to negate the existence of special employment, such as when “[t]he employee is (1) not paid by and cannot be discharged by the borrower, (2) a skilled worker with substantial control over operational details, (3) not engaged in the borrower’s usual business, (4) employed for only a brief period of time, and (5) using tools and equipment furnished by the lending employer.” (*Marsh v. Tilley Steel Co.* (1980) 26 Cal.3d 486, 492.)

These “ ‘individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.’ ” (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351.) The label the parties used is not dispositive. Instead, “ ‘[t]he nature of the work, and the overall arrangement between the parties, must be examined’ while keeping in mind the protective purposes of the workers’ compensation law.” (*Angelotti v. The Walt Disney Co.* (2011) 192 Cal.App.4th 1394, 1404 (*Angelotti*).)

Usually, the question whether a special employment relationship exists is a factual one for the trier of fact. (*Kowalski, supra*, 23 Cal.3d at p. 175.) However, if the evidence and the reasonable inferences to be drawn from such evidence are not in conflict, then the question becomes one of law resolvable by summary judgment. (*Angelotti, supra*, 192 Cal.App.4th at p. 1404; accord, *Wedeck, supra*, 59 Cal.App.4th at p. 857.)

Wedeck affirmed a summary judgment in favor of a special employer on workers’ compensation exclusivity where the undisputed evidence on the “primary” indicator of control and direction, and a “great majority” of the secondary factors, established the existence of a special employment relationship. (*Wedeck, supra*, 59 Cal.App.4th at p. 860.) Similarly, in *Caso*, the Court of Appeal affirmed a summary judgment on a professional stuntman’s tort lawsuit based on undisputed evidence regarding the detailed control and supervision over the stunt by the special employer, a production company.

The court so acted notwithstanding the stuntman's efforts to create a factual dispute because of the degree of skill and discretion involved in the planning and choreographing of his stunt. After reviewing the evidence on summary judgment, *Caso* concluded the facts did not support any conflicting inferences on the production company's ultimate authority and control over the stunt performances. (*Caso, supra*, 163 Cal.App.4th at pp. 890–893.)

As in *Caso* and *Wedeck*, we review de novo the summary judgment in favor of respondents and against appellants, and independently determine “whether the parties have met their respective burdens and whether facts not subject to triable dispute warrant judgment for the moving party as a matter of law.” (*Caso, supra*, 163 Cal.App.4th at p. 887; see *Wedeck, supra*, 59 Cal.App.4th at p. 855.) We liberally construe the evidence in favor of appellants and resolve all doubts concerning the evidence in their favor. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.) On appeal, the trial court's judgment is presumptively correct, and appellants must affirmatively demonstrate error. (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556–557.)

II. The SkyLife Partnership

As a threshold matter, we address the composition of the SkyLife partnership. According to the written partnership agreement, SkyLife is a partnership between general partners American Airborne and Rogers Helicopters. It is clear from the evidence, however, that American Ambulance was also a general partner who acted in concert with American Airborne and Rogers Helicopters to run the air ambulance partnership business. This is because, while American Airborne and American Ambulance are separate corporations, there is no meaningful distinction between them with respect to the conduct of partnership business and, even if American Ambulance is not named as a general partner in the written partnership agreement, it in fact acted as a general partner in the SkyLife partnership.

A partnership is formed by “the association of two or more persons to carry on as coowners a business for profit ... whether or not the persons intend to form a partnership.” (Corp. Code, § 16202, subd. (a).) “The ultimate test of the existence of a partnership is the intention of the parties to carry on a definite business as coowners. Such intention may be determined from the terms of the parties’ agreement or from the surrounding circumstances.” (*Greene v. Brooks* (1965) 235 Cal.App.2d 161, 165–166.) The parties’ intent may be implied from their acts; one of the primary elements of partnership is “[s]ome degree of participation by partners in management and control of the business.” (*Id.* at p. 166.) “A person who receives a share of the profits of a business is presumed to be a partner in the business.” (Corp. Code, § 16202, subd. (c)(3).)

The trial court properly concluded from the parties’ conduct and oral understandings that, while American Ambulance was not mentioned in the written partnership agreement, it was in fact associated with American Airborne and Rogers Helicopters in the operation of SkyLife. The SkyLife SOP manual showed clearly that the partners regarded the business as co-owned and operated by Rogers Helicopters and American Ambulance. The 123-page manual mentioned American Airborne only twice, each time lumping it together with American Ambulance: once in the organization chart and once in the statement, “SkyLife is a partnership between American Ambulance/ American Airborne EMS and Rogers Helicopters, Inc.” Otherwise, the SOP manual dealt exclusively with the policy, procedures and duties of the respective partners, Rogers Helicopters and American Ambulance, in SkyLife’s air ambulance business, and the job responsibilities of each partnership employee.

Moreover, as set forth in their declarations, the owners/directors of Rogers Helicopters, American Ambulance and American Airborne all intended SkyLife to be a partnership between Rogers Helicopters and American Ambulance via its shell corporation, American Airborne. It is undisputed that Rogers Helicopters and American Ambulance ran SkyLife’s day-to-day operations, and shared in the profits and losses.

American Airborne had no accounting records, payroll, personnel, facilities, employees or business activities separate from American Ambulance. Its only role in the partnership was to hold title to the SkyLife aircraft along with Rogers Helicopters. American Ambulance provided medical support services, including flight paramedics and nurses it employed, and billed its pertinent payroll, employee benefits and workers' compensation premiums to the partnership, while Rogers Helicopters did the same with respect to the aircraft operations it supplied to the partnership.

These facts establish that a partnership was created between American Ambulance, American Airborne and Rogers Helicopters. While appellants correctly assert that American Ambulance is not mentioned in the written partnership agreement, appellants ignore the reality that the parties intended the partnership to be one between Rogers Helicopters and American Ambulance, via its shell corporation, American Airborne, and the partnership operated in that manner. The only conclusion from the evidence is that Rogers Helicopters and American Ambulance were the actual partners of SkyLife.

III. SkyLife was Juarez's Special Employer

Respondents satisfied their burden on summary judgment of establishing SkyLife was Juarez's special employer, as the evidence they presented establishes SkyLife had the ability to control Juarez's work and the means by which it was accomplished.

SkyLife detailed its policies and procedures in the SOP manual, which show that SkyLife had significant control over the flight employees, including Juarez. The SOP manual provides that flight team members, namely, the flight nurses and paramedics employed by American Ambulance, and pilots and mechanics employed by Rogers Helicopters, are members of SkyLife and an "important part of a continuum that is a team effort." The manual provides detailed policies that dictate how medical crewmembers such as Juarez perform their duties, including their appearance, weight, schedules, certification requirements, crew quarters, procedures for log-in and equipment check-out,

documentation of events, including how to document updates on the patient's condition (such as vital signs, treatments/medications administered and patient response), and the acceptable level of patient care.

The SOP manual is highly probative of SkyLife's right to control, although it is not dispositive if there is disputed evidence to show the parties ignored the manual or otherwise created different realities in practice. (See, e.g., *Kowalski, supra*, 23 Cal.3d at p. 176 ["Although the terms of a contract may specify that a special employer retains the right to control the details of an individual's work or purports to establish an employment relationship, 'the terminology used in an agreement is not conclusive ... even in the absence of fraud or mistake.' [Citations.] 'The contract cannot affect the true relationship of the parties to it. Nor can it place an employee in a different position from that which he actually held.' "].)

There is no such contradictory evidence in the record, nor any evidence showing SkyLife and American Ambulance acted inconsistently with the SOP manual. To the contrary, SkyLife's program director, Epps, enforced the policies and procedures in the SOP manual; supervised the details and quality of the tasks that Juarez, and the other flight nurses and paramedics, performed; and coordinated the scheduling of medical personnel on 24-hour shifts at both of SkyLife's bases. Moreover, under Epps's supervision, SkyLife provided Juarez's work.

Appellants contend there is a "significant conflict of evidence regarding the applicability of [the SOP] manual to Juarez." Pointing to language in the acknowledgement of receipt of American Ambulance's employee handbook that the handbook "exclusively sets forth American Ambulance's employment policies and procedures and represents and expresses their complete agreement regarding the terms and conditions of employment," appellants assert the handbook was the predominant document governing Juarez's employment and, by its own terms, the exclusive source of information regarding his employment.

The handbook and its exclusive nature, however, are entirely consistent with a special employment situation where one employer loans out its employee to another. American Ambulance had its own policies and procedures regarding Juarez's employment with American Ambulance, as set forth in the handbook. When he was loaned out to SkyLife, however, he became a SkyLife employee who also was subject to its SOP manual, which expressly stated the manual was "intended to augment existing employee handbooks and operational procedures," with which SkyLife employees also were required to comply, and contained policies and procedures regarding "flight paramedics" such as Juarez who worked for SkyLife. The SOP manual did not alter Juarez's employment as an American Ambulance ground paramedic; instead, it created, in conjunction with the handbook, the terms and conditions of his employment as a SkyLife flight paramedic.

While appellants claim there is no evidence Juarez received or agreed to be bound by the SOP manual, Epps declared she provided a copy of the SOP manual to Juarez as part of his initial training, she required all personnel to review the manual, and aviation personnel such as Juarez were required to comply with its requirements. By working as a flight paramedic, Juarez accepted SkyLife's control over his work as a flight paramedic, including the SOP manual. (*Weddeck, supra*, 59 Cal.App.4th at p. 861, fn. 7 [" 'consent to the special employment relationship is normally implied, by the weight of authority, from acceptance of the special employer's control' "].)

In addition to controlling Juarez's work as a flight paramedic, SkyLife, through its general partner Rogers Helicopters, controlled the flights on which Juarez performed his paramedic duties, and integrated him as part of the flight team. Through its medical personnel training program, Rogers Helicopters trained Juarez on flight-related skills for the safe transport and care of emergency medical passengers, as required by section 135.621 of Part 135 of the FAR. Juarez attended most SkyLife monthly safety meetings and mandatory quarterly staff meetings, along with pre and postflight briefings, and wore

a SkyLife uniform while working on SkyLife flights. While Juarez was part of the flight crew, the pilot-in-command was “the final authority for safety of flight,” as well as “all loading of equipment, or anything related the operation of the aircraft.”

The evidence established SkyLife’s actual right to control the manner and means in which Juarez performed his flight paramedic duties. Appellants nevertheless contend there are disputed issues of fact regarding SkyLife’s right to control. They argue there are disputes regarding the existence of a direct relationship between Rogers Helicopters and SkyLife based on the SkyLife organizational chart, which they contend shows that Rogers Helicopters’ employees are not considered part of SkyLife because there are no arrows pointing from SkyLife to those employees. This argument, however, is meritless, as the chart shows that Rogers Helicopters’ employees are part of Rogers Helicopters, which in turn is part of SkyLife. This is consistent with how the partnership operated, with the SkyLife flight team comprised of pilots and mechanics employed by Rogers Helicopters and flight nurses and paramedics employed by American Ambulance.

Appellants also assert the declarations of Brooke Juarez and Rashel Hampl create an issue as to whether SkyLife controlled Juarez. Brooke’s declaration, however, merely sets out the fact that the two general partners generally supervised their respective general employees, while Rashel’s declaration simply stated she was informed her husband was not an employee of American Ambulance. Neither declaration creates an issue of fact as to whether SkyLife had the right to control Juarez as a flight paramedic.

Appellants contend lack of control is shown by the fact that Rogers Helicopters’ pilots had no right to supervise Juarez’s medical treatment of patients. But as SkyLife and Rogers Helicopters point out, this is a narrow view of the scope of air ambulance operations, and the pilot’s and Juarez’s roles. The goal of SkyLife’s operations was to provide safe air ambulance transportation of patients, which could only be accomplished through the complementary, and at times overlapping, roles of the loaned Rogers Helicopters and American Ambulance personnel. Juarez was not only providing medical

treatment—he was part of a team that was working in tandem towards the goal of safe air-transportation of a patient. This required him to be under the pilot-in-command’s control, and subject to the procedures and policies in the SOP manual that were in place to accomplish SkyLife’s goal, such as adhering to strict communication requirements and restrictions while in-flight. In that regard, Juarez was under the control of the pilot-in-command, who was also a SkyLife employee, loaned by Rogers Helicopters.

Noting that “[p]erhaps the strongest evidence of the right to control is whether the hirer can discharge the worker without cause” (*Ayala v. Antelope Valley Newspapers, Inc.* (2014) 59 Cal.4th 522, 531), appellants point out Epps did not have the capacity to fire a flight paramedic, but instead had to make the decision collaboratively through American Ambulance’s human resources department and Valeri. But as Valeri explained, decisions to terminate a paramedic’s employment were not made “unilaterally in our company. It’s a collaborative decision,” which involved a tremendous amount of input, investigation and resolution. The fact that the partnership had to act with the agreement of its partners simply reflects the nature of a partnership and does not change the analysis—the SkyLife partnership always had the power to end its special employment of Juarez.

Beyond the “primary” consideration of the right to control and direct, a substantial number of secondary factors favor the conclusion SkyLife was Juarez’s special employer: Juarez performed SkyLife’s work of providing air ambulance transportation for a substantial period of time; there was an agreement between American Ambulance, American Airborne and Rogers Helicopters to have American Ambulance lend its employees, including Juarez, to the partnership, who would then exert control over his work as a flight paramedic and reimburse American Ambulance for his pay and benefits; Juarez acquiesced to special employment by applying for the flight paramedic position and accepting SkyLife’s control and direction; SkyLife provided the place of

employment, namely, the bases and aircraft; and SkyLife was obligated to pay Juarez's payroll and benefits indirectly through American Ambulance.

Appellants attempt to create an issue of fact by arguing there are disputed questions on several of the criteria that may be considered in determining whether SkyLife acted as Juarez's special employer. They assert there is an issue of fact concerning whether there was an agreement or understanding between American Ambulance and SkyLife because Adams "did not understand paramedics" to be respondents' employees.¹² Epps conceded she had no authority to discharge or discipline flight paramedics; Valeri told Brooke Juarez each partner took care of their own employees and there was no overlap in employee oversight; and Rogers Helicopters did not believe it had an employment relationship with Juarez, as Weidekamp testified he only supervised the pilots, who do not supervise paramedic work, and Rogers Helicopters did not have the authority to fire paramedics.

None of this evidence, however, creates a factual issue concerning the parties' intent, namely, that each partner would loan their employees to the partnership, who would then be subject to the partnership's control, and the partnership would reimburse each partner for its employees' pay and benefits attributable to the work performed for the partnership. The partners did not always act independently; instead, they collaborated on issues such as employee discipline and termination.

Appellants point out that American Ambulance did not terminate its relationship with Juarez. American Ambulance, however, shared control of Juarez with SkyLife and

¹² This is not an accurate description of Adams's testimony. Adams testified that he oversees the process when American Ambulance employees want to work at SkyLife. When asked if he hired employees for SkyLife, Adams answered, "They are already our employees. It's not hiring—I'm trying to know how to word this. SkyLife is a sought-after position, and paramedics can apply for that, and if selected, they are assigned to SkyLife for part of their workweek." Thus, Adams essentially testified that once American Ambulance paramedics are selected, they are loaned to SkyLife.

Rogers Helicopters, which is typical of a joint employment arrangement. (*In-Home Supportive Services, supra*, 152 Cal.App.3d at p. 732 [“General and special employments occur when a general employer furnishes an employee to another person and during this engagement both employers have some right of control over the performance of the employee’s services.”].) American Ambulance loaned Juarez to the SkyLife partnership and transferred some right of control to the partnership, but retained control over Juarez when he worked in ground operations. When Juarez worked on SkyLife flights, American Ambulance no longer supervised Juarez and he was subject to the SkyLife SOP manual, worked under Epps and during flights, and was subject to the SkyLife pilot-in-command.

Appellants assert American Ambulance provided all medical equipment and tools. But this was consistent with American Ambulance’s responsibility under the partnership—it provided the medical equipment and personnel, while Rogers Helicopters provided the aircraft operations. Thus, the equipment and tools American Ambulance provided were effectively SkyLife equipment.

Appellants also claim the existence of a special employment relationship is negated because Juarez was a specialist and not directly supervised by anyone when performing paramedic work for SkyLife. That Juarez did not require constant supervision is immaterial to the undisputed evidence regarding SkyLife’s *right* to control and supervise his work. The case of *Wedeck* is on point. There, the plaintiff, a skilled chemist, argued factual allegations of self-supervision and technical expertise precluded summary judgment. The *Wedeck* court was unpersuaded: “That she performed her job without constant intervention by supervisors does not negate the undisputed fact that she was subject to Unocal’s control and direction. ‘As indicated, the control need not be exercised. It is sufficient if the right to direct the details of the work is present.’ ” (*Wedeck, supra*, 59 Cal.App.4th at p. 859.)

Similarly, with respect to the technical skill as a paramedic that Juarez brought to the job, the record shows that, while Juarez received his paramedic training through American Ambulance, he was subject to SkyLife's ongoing direction and control in performing his job, and expected to exercise his technical skill in the way dictated by SkyLife's policies and procedures. (*Wedeck, supra*, 59 Cal.App.4th at p. 859; see *Angelotti, supra*, 192 Cal.App.4th at p. 1405 ["Although stunt performance requires particular skill, the significance of this factor is mitigated where the work is done under the direction of another and the stunt performer has no substantial control over the operational details."].)

Finally, appellants point out that Juarez was on American Ambulance's payroll, he received employee benefits from American Ambulance, Valeri determined his wages and bonuses, and American Ambulance's human resources department generated and maintained Juarez's payroll and employment records. The evidence was undisputed, however, that SkyLife bore the relevant payroll expenses of Juarez's employment.

Appellants fail to recognize that general employers often retain some form of control over their loaned employees. (*Brassinga v. City of Mountain View* (1998) 66 Cal.App.4th 195, 216 ["[R]elinquishment of 'all' control is not necessary for creation of a special employment relationship. 'Facts demonstrating the existence of a special employment relationship do not necessarily preclude a finding that a particular employee also remained under the *partial control* of the original employer.' "].) Evidence that the general employer handled such administrative details as payroll is inherent in loaned employment relationship, "where the general employer often handles administrative details, including payroll." (*Wedeck, supra*, 59 Cal.App.4th at p. 861, fn. 8.) American Ambulance's handling of Juarez's pay and benefits, and that Valeri determined his wages and bonuses, is consistent with American Ambulance's role as a partner in SkyLife.

As in *Wedeck*, there is no requirement of unanimity in the special employment factors before summary judgment may be granted. Given the undisputed evidence with

respect to SkyLife's right to control and direct Juarez's activities, along with the substantial number of other factors favoring a special employment relationship, we conclude as a matter of law that SkyLife was Juarez's special employer.

IV. Rogers Helicopters and American Airborne are Also Special Employers

It has long been the law in California that an employee of a partnership is an employee of each of the partners; therefore, each partner is entitled to the protection of the exclusive remedy provisions of the Labor Code for injuries a partnership employee incurs in the course and scope of employment. (*Reed v. Industrial Acc. Com.* (1937) 10 Cal.2d 191, 193; *Horney v. Guy F. Atkinson Co.* (1983) 140 Cal.App.3d 923, 927 (*Horney*); *Sonberg, supra*, 220 Cal.App.2d at pp. 682–683.) Applying that principle here, the trial court determined that because SkyLife was Juarez's special employer immune from tort liability, its partners, American Airborne and Rogers Helicopters, also were immune.

Appellants contend the trial court erred in relying on *Sonberg* to conclude SkyLife's status as Juarez's special employer extended to its partners. In *Sonberg*, the court held that a partnership employee injured in the course and scope of her employment by a partner's negligence may not maintain an action to recover damages from the negligent partner. (*Sonberg, supra*, 220 Cal.App.2d at p. 682.) In so holding, the court noted that a partnership is not recognized as a distinct entity separate from its members and an employee of the partnership is an employee of each partner. (*Ibid.*) The court rejected the plaintiff's argument that at the time of the accident the negligent partner was her fellow employee, and thus liable for negligence. The court reasoned that, "regarding a partnership as an association of individuals and not as a separate entity," a partner acts not only for himself but also for all those associated with him, "each partner being liable for any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership." (*Id.* at pp. 682–683.) Since the plaintiff was the employee

of each of the partnership's members, her remedy was limited to workers' compensation. (*Id.* at p. 683.)¹³

In *Horney*, the court, following *Sonberg*, held that an employee of a joint venture is an employee of each individual member of the joint venture, so that each member is entitled to the benefits of the workers' compensation exclusivity provisions. (*Horney*, *supra*, 140 Cal.App.3d at pp. 925, 927–928.)

Appellants argue *Sonberg* is no longer good law because California no longer follows the aggregate theory of partnership. In 1996, the California Legislature enacted the Revised Uniform Partnership Act (RUPA), with modifications, entitled the Uniform Partnership Act of 1994 (the 1994 Act) (Corp. Code, § 16100 et seq.), which initially applied only to partnerships formed on or after January 1, 1997. Beginning January 1, 1999, the 1994 Act replaced the Uniform Partnership Act (UPA) with respect to all partnerships. (9 Witkin, Summary of Cal. Law (11th ed. 2017) Partnerships, § 18, p. 606; see Assem. Bill No. 583 (1995-1996 Reg. Sess.) ch. 1003, § 1.2; Corp. Code, § 16111.)

“The UPA followed the aggregate or common law theory regarding the nature of a partnership: A partnership was merely a group of individuals, not a distinct legal person or entity.” (9 Witkin, Summary of Cal. Law, *supra*, Partnership, § 26, p. 613.) Under the 1994 Act, however, “[a] partnership is an entity distinct from its partners.” (Corp. Code, § 16201.) By treating a partnership as an entity distinct from its partners, the 1994 Act resolves “the historic conflict between the aggregate and entity theories of partnership. However, the 1994 Act retains the aggregate approach for some purposes, such as partners’ joint and several liability.” (9 Witkin, Summary of Cal. Law, *supra*, Partnership, § 18, p. 607; see 6 Part II West’s U. Laws Ann. (2015) U. Partnership Act

¹³ Treatises continue to cite the principles stated in *Sonberg*. (See 65 Cal.Jur.3d (2012) Work Injury Compensation, § 132, p. 222 [“An employee of a partnership is not the employee of an entity, but is the employee of each partner.”]; 2 Cal. Civil Practice: Workers’ Compensation (Bancroft-Whitney 2007) § 15:6, p. 15-12 [“If the employer is a partnership, each partner is protected as an employer from civil suit.”].)

(1997) Prefatory Note, p. 228 [“The [RUPA] enhances the entity treatment of partnerships to achieve simplicity for state law purposes, particularly in matters concerning title to partnership property. RUPA does not, however, relentlessly apply the entity approach. The aggregate approach is retained for some purposes, such as partners’ joint and several liability.”].) As stated in Corporations Code section 16306, subdivision (a), “all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.”

Appellants note the apparent conflict between *Sonberg* and Corporations Code section 16201,¹⁴ and urge us to “use this opportunity to clarify the implications” of that section on special employment law. They claim the cases of *Rogness* and *Orosco v. Sun-Diamond Corp.* (1997) 51 Cal.App.4th 1659 (*Orosco*) have significantly vitiated the holdings of *Sonberg* and *Horney*, and implicitly adopted the entity theory of partnership. They argue that even if American Airborne and American Ambulance are the same entity, under *Rogness* and *Orosco*, Juarez was not, as a matter of law, also an employee of SkyLife and Rogers Helicopters; therefore, both entities must prove a special employment relationship with Juarez. As such, appellants ask us to require all respondents to “definitively prove they independently employed Juarez.”

Respondents first contend that appellants waived this argument by failing to raise it properly in the trial court. As respondents point out, appellants did not raise this issue until oral argument on the summary judgment motion—when it was too late to permit

¹⁴ This conflict was noted in the federal case appellants cite, *Romo v. Shimmick Construction Company, Inc.* (N.D. Cal. 2014) 23 Wage & Hour Cas.2d (BNA) 1417, 2014 WL 6450249. There, the federal district court noted it was not entirely clear that *Horney*, which cited *Sonberg* and *Reed*, was still good law, as it “relied on the proposition that ‘a partnership is [generally] not recognized as distinct entity separate from its members,’ ” but “[i]n California, that is no longer the law: the Corporations Code now provides that ‘[a] partnership is an entity distinct from its partners.’ ” (*Romo, supra*, 2014 WL 6450249, *5, fn. 2.) The court, however, did not resolve the issue. (*Ibid.*)

respondents to respond. Moreover, the argument appellants made below was slightly different than the one they make on appeal. While appellants asserted in the trial court that *Sonberg* was no longer good law due to the enactment of Corporations Code section 16201, they offered no suggestion as to what the law should be. Instead, appellants compared *Rogness* to the instant case and submitted *Rogness* “could be applicable here” and was “worthy of the Court’s consideration.” Significantly, appellants did not argue that each respondent was required to independently prove it was Juarez’s special employer.

“It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal.” (*In re Marriage of Eben–King & King* (2000) 80 Cal.App.4th 92, 117.) In other words, issues and theories not properly raised in the trial court are forfeited on appeal. (*DiCola v. White Brothers Performance Products, Inc.* (2008) 158 Cal.App.4th 666, 677; *City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 685 (*City of San Diego*).)

An exception to this rule applies, however, when “ ‘a question of law only is presented on the facts appearing in the record....’ ” (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; accord, *Barton v. New United Motor Manufacturing, Inc.* (1996) 43 Cal.App.4th 1200, 1207; see *City of San Diego, supra*, 126 Cal.App.4th at p. 685.) Nevertheless, “ ‘ “if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal.” ’ ” (*Strasberg v. Odyssey Group, Inc.* (1996) 51 Cal.App.4th 906, 920; see *City of San Diego, supra*, at p. 685.)

Appellants have failed to show this new argument presents solely a question of law based on facts appearing in the record. While this issue involves the legal question of whether a partnership’s workers’ compensation immunity extends to its partners, it

also presents factual questions, since if appellants are correct that each respondent must prove it is Juarez's special employer, that issue is a factual one that respondents had no opportunity to address or rebut below. Thus, forfeiture is especially appropriate: "A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." (*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334, 1350, fn. 12.)

In any event, while appellants claim each partner must be assessed individually to determine whether they also were Juarez's special employer, under the circumstances in this case, there is no way to parse out the actions of the partnership from those of its two partners. As American Airborne points out, "[e]ach partner acted as an instrumentality of the partnership in every way that involved Juarez." American Airborne, through its alter ego, American Ambulance, was directly involved in all medical operations the partnership performed, while Rogers was directly involved in all of its flying activities. There was no division of identity that would enable us to somehow segregate an individual partner's actions from those of the partnership: If the partnership acted to employ Juarez, then so did its partners.

Appellants' reliance on *Rogness* and *Orosco* is misplaced. In *Rogness*, the plaintiffs, whose employer, Monticello Homes, Inc., was part of a joint venture, were injured when they were working as Monticello employees on a house being built by the joint venture, but they were not employees of the joint venture. (*Rogness, supra*, 194 Cal.App.3d at pp. 191, 193.) The issue before the court was whether "an employee of one party in a joint venture is ... as a matter of law also an employee of the joint venture itself or the other joint venturers and therefore is ... limited to his workers' compensation remedy under the Labor Code in seeking recovery from the remaining joint venturers for alleged negligence." (*Id.* at p. 191.) The court determined the answer was no and concluded: "Joint venturers who wish to rely upon [the exclusive remedy provision of]

Labor Code section 3601 in order to avoid general exposure to employment related tort actions by employees of their other joint venturers must cause the joint venture to employ such individuals.” (*Id.* at p. 194.)

Rogness has no application here because the partnership did employ Juarez. When Juarez was killed, he was acting on behalf of the partnership, engaged in partnership business, and directly controlled by the partnership. The *Rogness* court did not, as appellants assert, implicitly adopt the principle that a partnership and its partners are distinct entities, as the court explicitly affirmed “the well established rule that an individual employed by a joint venture or a partnership is an employee of all of the joint venturers or partners.” (*Rogness, supra*, 194 Cal.App.3d at p. 193, citing *Horney, supra*, 140 Cal.App.3d at p. 927.)

Neither does *Orosco* assist appellants. There, the employee of a raisin grower was injured while working on machinery used to process raisins for a marketing cooperative to which his employer belonged. The employee alleged his employer was negligent in maintaining the equipment; after receiving a workers’ compensation award from his employer, he attempted to hold the other members of the cooperative liable for tort damages without any showing they were directly at fault in causing his injury. (*Orosco, supra*, 51 Cal.App.4th at pp. 1662–1663.) The *Orosco* court rejected the attempt because (1) his employer and the defendants were not engaged in a joint venture for the processing of raisins for sale, and (2) even if such a joint venture existed, the other joint venturers would not be liable unless either the joint venture, or one of its members (other than the employer), were negligent, as workers’ compensation exclusivity prevents nonnegligent members from seeking indemnity from the negligent employer. (*Id.* at pp. 1665–1666, 1670.)

Orosco has no bearing here, where Juarez was employed by the partnership, not just one of the partners, and he was killed while engaged in the partnership’s business. Moreover, *Orosco* did not address the issue here, namely, whether a partner, sued for

allegedly injuring a partnership employee who was engaged in partnership business, may have tort liability as a co-employer of that person. Appellants have not presented any authority to support their proposition that each respondent must “definitively prove they independently employed Juarez.” As all the partners’ relevant acts or omissions were those of the partnership in the conduct of its business, such independent analysis is not required.

Appellants’ wrongful death claim alleges negligence with regard to the piloting and maintenance of the helicopter. The pilot, Hampl, as a full-time employee of SkyLife who flew exclusively on its flights, was Juarez’s co-employee and a special employee of the partnership. If appellants were allowed to recover against Hampl’s general employer, Rogers Helicopters, for his alleged acts or omission while participating as a SkyLife pilot in a SkyLife operation, they effectively would be circumventing the exclusive remedy doctrine. In addition, with respect to negligence regarding the maintenance or ownership of the helicopter itself, it is undisputed the helicopter was a SkyLife helicopter which SkyLife was using in its air ambulance operation. Since appellants cannot recover against SkyLife for its alleged negligence and ownership of the helicopter, because it was Juarez’s special employer, appellants would again be circumventing the exclusive remedy doctrine if allowed to recover against SkyLife’s partners.

In sum, based on the facts and circumstances of this case, since SkyLife was Juarez’s special employer, SkyLife’s general partners, American Airborne and Rogers Helicopters, are also Juarez’s special employers. As such, respondents are all immune from tort liability and the trial court properly granted summary judgment in their favor.¹⁵

¹⁵ Since American Airborne is immune from liability as Juarez’s special employer, we do not decide the alternate, independent ground on which American Airborne brought its motion, namely, that it was immune as American Ambulance’s alter ego. (See *Waste Management, Inc. v. Superior Court* (2004) 119 Cal.App.4th 105, 110 [Liability may not be imposed on parent corporation for its subsidiary’s employee’s injuries based solely on the parent-subsidiary relationship].)

DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

DE SANTOS, J.

WE CONCUR:

DETJEN, Acting P.J.

PEÑA, J.